ANALYSIS OF ENVIRONMENTAL ADVERTISING STRATEGIES AND RECOMMENDATIONS FOR THE IMPLEMENTATION OF REGULATORY POLICIES

by

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Consumers often use advertising to learn about product benefits and to make important purchasing decisions. In recent years the business and advertising communities have profited by consumers' demands for products that are environmentally benign by implementing a new strategy called "green marketing." Unfortunately, while some of the advertisements in this category relay beneficial, accurate and honest product information, the majority are vague, misleading and unreliable.

However, because this is a relatively new field, federal regulation is still in its infancy, and, in fact, a particular regulatory body has not been officially selected to deal with this type of advertising. As a result, many agencies, private and public, have issued recommendations or offered suggestions for creating specific guidelines. The Federal Trade Commission is the main federal regulatory body which investigates claims of deceptive advertising, and it has heard testimony from many sources in an effort to

produce the most effective rules.

Until regulations are thoroughly researched and implemented, however, many businesses will continue to use environmental labels when neither they nor their products are green. This could have disastrouos results on consumers and the entire environmental wave.

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I.

Introduction to Environmental Marketing

In the late 1980's a new marketing trend began to originate in response to a rising demand by consumers for products that did not harm the environment. This type of advertising, known as green marketing, has no specific regulatory guidelines, and, as a result is very misleading and deceptive. Businesses, in an effort to respond to new consumer needs, are doing everything possible to market products within the vague boundaries of the environmental movement, and are sending product messages that are frequently unsubstantiated or irrelevant. After all, "everyone wears green on St. Patrick's Day, but it doesn't make them Irish."[1] People and industry, no matter how busy or profit driven, need to take the time to commit themselves to improving the land, air and water around them. Consumers, in the past few years, have demonstrated their willingness to change buying behaviors in order to purchase products more environmentally benign, rather than those that are perhaps more familiar or less expensive.

However, as stated in the introduction to The Green Consumer, an environmental buying guide that evaluates products and offers suggestions for more 'earth-friendly' purchases, "consumers need the tools with which to vote with their dollars and decide which businesses to support and which businesses have values that they agree with and

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[1] Advertising Age. 29 October 1991: 26.

which businesses don't."[2] The most readily available and accessible tool for consumers to use when making product decisions is advertising, and unfortunately, this tool often proves to be more misleading than beneficial. Firms are able to promote almost anything under a green label, as long as it is grounded in some environmental truth.

The federal government, more specifically the Federal Trade Commission (FTC), also has a role to play in the rising quality and quantity of environmental marketing. Consumers, industry, state and local governments and consumer action groups have asked the FTC to create a uniform set of guidelines to be used when developing, understanding or evaluating environmental advertising. Unfortunately, this is a long and involved process, and until the situation is resolved, consumers may receive false information or lose interest altogether in the green movement.

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[2] Elkington, John, Julia Hailes, and Joel Makower. The Green Consumer, p. xii.

II.

What is Green Marketing and Why Should it be Regulated?

Increasing environmental awareness has created a new consumer market with the potential to affect behavior not only in the United States, but also around the world. The American public is becoming more and more aware of environmental problems that have grown so large they can no longer be ignored. "[Americans are] increasingly concerned about environmental issues, and people are looking for ways to do their part to protect and restore our nation's resources".[3] In other words, people are beginning to realize that buying decisions and product use can have an adverse effect on the environment. The issues span the globe, and the not-in-my-back-yard theory (NIMBY) has been erased by the perception that many problems have become so substantial that they can't help but affect everyone's backyard. The knowledge that using hair spray containing chlorofluorocarbons can increase the hole in the ozone layer, that throwing away paper increases the amount of waste packing our limited landfills, and that the convenience of plastic will be around literally for thousands of years is finally taking precedence in the minds of consumers over many other short-term product benefits. The "public often

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[3] The Green Report: findings and preliminary recommendations for responsible environmental advertising, p. 1.

begins to take action because of perceived personal threats,"[4] and this action can be directly linked to consumers' rapidly changing purchasing habits. It appears that consumers are really beginning to recognize the dangers that some products present to the earth, and are attempting to help by modifying their buying behaviors. In fact, survey results from the Roper Organization revealed that over 85% of the people studied said that the number one "in" thing for 1991 was environmentalism.[5] The "idea that ordinary people can affect the environment through their purchasing decisions has become very popular," and affords the American public with the means to participate in the "green" wave of activism.[6] This newfound "sense of social responsibility is beginning to color purchasing decisions," and has elicited a response from the business community in the form of a new marketing strategy.[7] And, from Alpo to Wisk, "every marketer and his brother is responding to the explosion of environmental consciousness by wrapping themselves in green."[8] This technique, known as green marketing, has become the advertising craze of the 1990's.

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[4] Yearley, Steven, The Green Case, p. 109.

[5] Keller, Edward B. "The Environment: Whither Green Marketing?" p. 2.

[6] Yearley, p. 98.

[7] Carson, Patrick and Julia Moulden, Green is Gold, p. 116.

[8] Advertising Age. 29 January: 26.

Bandwagon Effects of Advertising Trends

Advertising trends tend to follow the interests of the consumers and reflect their desires. These crazes are nothing new to the American public, as marketing strategies have capitalized on other perceived fears, social movements or general consumer interests for decades. Advertising has reflected changing values with regard to beliefs and behaviors, and examples of these trends are readily apparent.

In the past, advertising has promoted racial diversity, patriotism, and equality. A more recent advertising craze coincided with Americans' rising health consciousness. This concern for nutrition arose about the same time that green marketing began its slow climb to popularity. Many themes in food advertising reflected the increasing nutritional interest and, just as today the market is filled with words like "recyclable," "degradable," "ozone safe," and "environmentally friendly," the advertising community overused words like "lite," "cholesterol free," and "natural." Regulating agencies like the Food and Drug Administration (FDA) and the Federal Trade Commission, however, stepped in and began to take an active role in the regulation of food and nutrition claims. These offices were on the lookout for marketers who overstepped their bounds with regards to the legality of food claims. Often ads were found to be deceptive and appropriate measure were taken against the misleading agency. Kraft, for example, was under investigation in 1985 for claiming that its Cheez Whiz was made from "real cheese,"[9] and again in 1987 for

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[9] "Deceptive Ads: The FTC's laissez-faire approach is backfiring." Business Week 2 December 1985: 136.

overstating the calcium content of Kraft Singles.[10] Consumers are often instrumental in initiating investigations, as was one who helped start a lawsuit against the Coca-Cola Company for deceptive product labelling in Diet Coke ads and on the cans. The ads said "Now with Nutra-Sweet," even though the product still contained saccharine. Coca-Cola lost the lawsuit and eventually changed the label to read that Diet Coke contained a "Nutra Sweet blend."[11] More recently, the Campbell Soup Company was faced with deceptive advertising charges when it claimed that its soups could "reduce the risk of heart disease because they were low in fat and cholesterol".[12] The FTC ruled that, because the company did not disclose the fact that many of their soups were also high in sodium, which contributes to high blood pressure, the ads were deceptive and misleading.

Furthermore, regulatory agencies, experienced the disadvantage of not having any set definitions of health terms, and consumers were often mislead by words like "lite," which could refer to the caloric content of a product or which could merely mean that the color of the item was lighter. In other words, unless set standards of food claims were implemented, agencies could use terms, like "lite," which were technically true but were open to misinterpretation.

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[10] Schiller, Zachary and Reginald Rhein Jr. "Tell Us Why It's New and Improved - But Keep Health Out of It." Business Week. 10 August 1987: 47.

[11] "Deceptive Ads: The FTC's laissez-Faire Approach is backfiring," p. 140.

[12] Pember, Don R. Mass Media Law, p. 489.

Initial Regulatory Concerns

It seems apparent that, just as advertising follows patterns, so does regulation. If an idea or social value becomes a national trend, then the idea finds its way into advertising strategies. This theme could potentially become overused or abused by marketers, and, as a last resort, the federal government will step in and offer regulation. In addition, state and local governments, as well as interagency regulatory organizations like the National Advertising Division, will attempt to provide some guidance on smaller or more specialized scales.

The primary difference, however, between the green marketing wave and other advertising trends lies in the vast range of products, concepts and issues that can and do affect the environment. Whereas other trends have been necessarily limited in the products they represented, the magnitude of environmental issues ensures that green marketing will have a much wider target audience and product range. In other words, although a cholesterol claim may affect a large number of food products, a packaging claim can be made for most products.

Green marketing is presently being utilized by many businesses in response to consumers' demands for "environmentally friendly" products and product benefits. Concern for all of the issues contained in the green wave -- ozone depletion, global warming, deforestation, loss of habitats, species extinction, food scarcity, water contamination, waste and waste disposal, air pollution and acid rain -- has led many companies to claim that their products provide some service to the environment, or, at least, do not significantly contribute to environmental harm. Because consumers look seriously at these claims to determine which products are best for the environment, it is important that some standards be established so that the information contained in these ads is accurate, honest, and not misleading. "J. Walter/Thompson USA advertising agency reports that nearly 50% of all North Americans have taken some kind of green consumer action, whether by reading a product label for environmentally harmful ingredients or by buying a product they believed was better for the environment".[13] A response of this proportion to an issue or trend produces an enormous target audience for marketers because of the number of products and strategies that can be used. Advertising Age estimated in October 1991 that by 1995, green product sales will total $8.8 billion.[14] In addition to the expected growth in green product sales, the rising interest in green marketing stems in part from the fact that earth-friendly products are being introduced "at a rate twenty times higher than all regular product introductions".[15]

Need For Standards

This formidable interest in the environment has prompted many companies to associate with the green marketing wave regardless of the validity of their environmental claims. Being a profit motivated society, "the bandwagon effect will be inevitable: as

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[13] Carson, Patrick and Julia Moulden, p. 116.

[14] Advertising Age. 28 October 1991: GR-11.

[15] Schorsch, Jonathan. "Are Corporations Playing Clean With Green?" Business and Society Review. Fall 1990: 6.

businesses continue to receive messages from the American consumer there will be a flood of green advertising in the market."[16] Many companies are able to use misleading campaign claims about products that have no real environmental benefit in an area that should be more "eco-friendly," because no set standards of green marketing or of the terms contained within the field currently exist. Steven Yearly, author of The Green Case, writes "environmentalism is about saving the planet, industry is about making a profit and the two do not mix."[17] This is, in fact, only partially true. The past years have revealed that many companies are responding to the need to make environmental changes in packaging, manufacturing and disposing of products and waste. This honest and admirable effort, however, is beginning to be drowned out by the numerous false and misleading claims that are cluttering the market and confusing consumers. The potential for positive environmental action in this field is enormous, but unfortunately the potential for deception is equally large.

The Rise and Problem of Trivial Claims

The Green Report, an analysis of green marketing drafted by a task force of the state Attorneys General (the Task Force), explains that environmental advertising can be "informative to conscientious consumers when it is used honestly," but attempts to take advantage of consumer interest have led to some trivial, deceptive, or confusing

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[16] Elkington, et al. p. 11.

[17] Yearley, p. 103.

environmental claims.[18] In England, for example, "a British Nuclear spokesman says its recently developed campaign stresses that nuclear plants, unlike conventional plants, don't pollute the air."[19] This ad, at least, received the "Green Con Award" in London. However, as inane as this ad sounds, a similar strategy is being used to support the nuclear industry in the United States in 1992. The ad claims that "trees aren't the only plants that are good for the atmosphere," and that "nuclear energy means cleaner air." [20] Apparently the threat of nuclear accidents and the problem of waste disposal isn't enough to "[sacrifice] the quality of our environment."[21] However, due to the overall lack of regulation, these ads are published in the same magazines that run articles detailing the effects of nuclear meltdowns and the long-term consequences of dumping nuclear waste in ocean trenches. It is this category of ad that causes green marketing to lose its credibility. Even more tragically, consumers believe the message the ad sends.

In addition, some advertising efforts have trivialized the environmental movement by using words like "green" or "environment" somewhere in slogans and headlines, or by making a completely irrelevant association to the environment. Industry is taking advantage of the fact that consumers' interest in the environment is rarely backed with

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[18] The Green Report, p. 1.

[19] Holcomb, John M. "How Greens Have Grown." Business and Society Review. Fall 1990: 33.

[20] USCEA 1991.

[21] Ibid.

the information necessary to decipher all of the green marketing claims. Agencies that would cheaply tack on New! or Improved! are now simply adding Green! to their messages, in hopes that consumers will not delve to deeply into their product claims.

Furthermore, humor, while occasionally in good taste, often makes light of what is a very grievous problem. For example, in Great Britain, an ad for a convertible car claimed that its product was better for the environment than other cars because it was 'lid free.'[22] "When declarations of environmental righteousness become a gimmick, a fad or a cynical device for exploiting the consumer - which so far seems to be the case most of the time - green marketing threatens to die aborning."[23] It is this aspect of green marketing that demonstrates the need for regulation, before the American public perceives "the green sell degenerating into the green con."[24]

Reasons for Concern

As long as green marketing remains unregulated, at least on a federal level, many consequences will continue to slow environmental progress. Many groups currently researching this problem, like the National Association of Attorneys General, the Federal Trade Commission and the Environmental Protection Agency, fear that consumers, if faced with a barrage of misleading ads will tire of attempting to decipher the good from

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[22] Yearley, p.2.

[23] Advertising Age. 29 January 1991: 26.

[24] Yearley, p. 99.

the bad and give up the environmental cause altogether. The Task Force accurately sums up many of these fears:

> "If consumers begin to feel that their genuine interest in the environment is being exploited, consumers would no longer seek out or demand products that are less damaging to the environment. If this were to occur, the environmental improvements that could be achieved by consumers purchasing more environmentally benign products would be lost. Equally troublesome is the possibility that some environmental claims might lead the public to believe that either the problem does not exist or that it has been solved."[25]

For example, the lack of concern given to issues of regulation in green marketing could be perceived as an indication that either the problems facing the earth are not as severe as has been previously indicated by environmental action groups, or that the problems have been adequately solved and green marketing is an inconsequential leftover of a concerned era. In either situation, the consumer gives up monitoring products for their environmental benefits or costs, thus eliminating the small gains that were being made.

In addition to urging from various consumer action groups, the federal government is receiving pressure from another segment of society that is also lobbying for regulation of green marketing: the business community. Some companies are attempting to follow new guidelines for manufacturing green products and are frustrated by other businesses that continue to advertise green without actually making a commitment to the environment. One definition of green products states that:

> "green products are reformulated to reduce solid waste by using less packaging and recycled or recyclable packaging; to reduce hazardous

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[25] Green Report, p. 6.

waste by eliminating or reducing the use of toxic materials or chemicals; to reduce harm to the ozone layer by avoiding use of chlorofluorocarbons, and so on."[26]

Going green is a time-consuming and strenuous task, and many companies that are making concerted and costly efforts to improve methods of manufacturing, product materials, and product life cycles are demanding regulation to prevent other businesses from unfairly joining this marketing trend. One author questions, "Are we entering a green new world? Or are we seeing the rise of what some have called eco-pornography?"[27] According to Steven Yearly, "the response to green consumerism is likely to be an attempt to make the easiest and cheapest environmental improvements to [businesses] products and to take reforms only as far as is necessary to retain market share."[28] Meanwhile, the companies that are making thorough changes in all or many aspects of their business procedures, are asking for new "cradle-to-grave" regulations, while other industry members are taking full advantage of the fact that they can capitalize on the most insignificant green aspect of a product.

One of the means of regulation that is being recommended to the Federal Trade Commission by the Task Force and other agencies is a system that evaluates products on a "cradle-to-grave" basis. This is a term "scientists use to denote the study of environmental impact from the 'birthing' of a product - raw natural resources extraction -

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[26] Schorsch, p. 6.

[27] Ibid p. 6.

[28] Yearley, p. 100.

through manufacture, product use, and disposal - back to the 'grave.'"[29] However, this type of thorough product evaluation has received large amounts of opposition in the business community. In other words, some firms and most environmental advocates would like a system of regulation that examined a product from the beginning of its manufacture to the end of its life (its degradability), while the majority of businesses continue to push for a lesser degree of product examination which allows them to promote a product a green when neither the product nor the company is anywhere close to being environmentally friendly. After all, "if you are polluting streams that are going to be ruined for the next 10,000 years, it doesn't matter is your box is biodegradable."[30] Hubert Humphrey III stated in the introduction to the Green Report that "[he worries] that claims about the environmental effects of products will be exploited and distorted. . .What does it mean to say a styrofoam cup is recyclable when the only recycling program is 2,000 miles away?"[31] Without regulation, some "companies will only stress those aspects of their work which appear green, and consumers will not inquire too deeply."[32] However, the point must also be made that these businesses are relying on a certain amount of ignorance on the part of the customer. Consumers lack the knowledge and resources to investigate every green advertising claim; again showing the need for

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[29] Schorsch, p. 8.

[30] Carson, Patrick and Julia Moulden, p. 162.

[31] Green Report, p. 7.

[32] Yearley, p. 100.

regulation. Furthermore, the burden of proof of environmental claims should lie with businesses, not with consumers.

The Need for Leadership in Regulation

In order to establish the urgency and seriousness of the entire environmental movement, regulation must be implemented in many problem areas. One of these areas is perhaps a little more critical because the American public has already shown a marked interest in green consumerism. In order to maintain and develop this system of purchasing products that have a more benign effect on the environment, the federal government must realize the extent to which this marketing strategy is being abused, what it would take to establish regulations and what the outcome would be. The FTC currently handles most of the regulatory practices on the federal level, yet it is often accused of being very lax. The FTC does not appear willing "to take part in any attempts to define terms, preferring to deal with issues on a case-by-case basis."[33] The FTC is also criticized for not taking an active role in the process of investigating cases of deceptive advertising. Judging by past policy, the FTC will rarely take initiative in investigating advertising, and is more likely to wait until another consumer protection group, the EPA, industry or a consumer calls its attention to a misleading advertising claim before it responds. A set of regulations needs to be established and one federal body, or an organized group made up of various agencies, should be given the task of enforcing the regulations. These regulatory practices must be implemented with all expediency before

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[33] Advertising Age. 29 January 1991: 27-28.

consumers and businesses lose interest in green marketing, and the green wave loses one of its more valuable efforts.

III.

The Current State of Green Marketing

In order to understand the need for regulation in green marketing strategies, it is essential to get an overview of the market as it exists today. Environmental advertising covers a very broad range of topics with varying degrees of deception. Of course, there are some important examples of positive corporate change, but the large scale of deceptive or misleading claims expressly demonstrates the need for federal guidelines. These federal guidelines are necessary in order to establish a consistent means of regulation. In other words, regulation that conflicts from state to state will not only confuse consumers, but also make creating national campaigns very difficult for businesses. Furthermore, not only is regulation needed to guide existing product claims, but also many of the new products that are entering the market as green. The Green Consumer states:

> "The result is a mixed bag of green products. There are some environmentally harmful products wrapped in green packaging. Some green products don't clearly state their greenness, while other products claiming to be green are not. To make matters worse, several of the corporations producing green products are among the world's biggest polluters.[34]

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[34] Elkington et al. p. 7.

As a result, consumers have an overwhelming amount of choices to make, and without proper information and regulation, the decisions they make could be inaccurate.

Positive Examples of Green Marketing

While numerous examples of deceptive green advertising exist, it seems appropriate to give credit to those businesses that have made an legitimate effort to join the green wave. Unfortunately these positive marketing strategies are more often than not overshadowed by all of the deceptive claims in the market.

Since consumers have demanded environmentally friendly products, a few businesses have made modifications in the packaging of their products, the materials used or the manufacturing process. Consumers have helped initiate many of the changes by boycotting or petitioning non-green companies. The fast food market is a good example of this kind of consumer pressure prompting real change. McDonald's decision in 1987 to "abandon the use of CFC's in fast-food cartons" was a major milestone. Of course, the threat that customers were planning to boycott McDonald's and Big Macs played a large role in the move.[35] As a result, competitors followed. Burger King now packages all of its Kids Club specials in paper bags made of recycled material.[36] McDonald's has also responded to other consumer demands by stating that it will no longer purchase "beef from rain forest or recently deforested rain forest land," and that it is launching

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[35] Hemphill, Thomas A. "A Solid Program for Solid Waste?" Business and Society Review, p. 70.

[36] Wynne, Roger, "Green Marketing: Legal and Regulatory Framework." L.A.W. Conference, Eugene, Oregon, 12 March 1992.

"McRecycle USA," a program to incorporate recycled materials into building or remodeling.[37]

In addition to changes in fast-food chains, many other businesses have made some packaging modifications. Proctor & Gamble made one of the first packaging moves with its Downey Refills. As explained in the ads, a consumer initially buys the large plastic container, and then is able to keep on refilling it with small packages of Downey concentrate. The strategy, the ad explains, is to reduce the amount of waste heading for America's already overflowing landfills.[38]

Many businesses are also receiving environmental messages from major store chains. Wal-Mart is the best example of this strategy. The national chain began asking for brands and products that contributed to the environment, not harmed it. More importantly, some supermarket chains, like Safeway, have begun to develop their own environmental brands. The Environmental Options brand, promoted in some of Safeway's advertisements, provides products for consumers who wish to make greener buying decisions.

Finally, Anheuser-Busch Companies have started an advertising campaign which elucidates on the benefits of recycling cans. The ad, "You won't believe what this can can do," not only expands on the energy that would be saved if everyone recycled their

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[37] "Company Performance Roundup," Business and Society Review, Summer 1990: 64-65.

[38] Downey Commercial 1992

cans, but also what Anheuser-Busch is doing to help the environmental cause.[39] In this case, the company uses the ad to describe the Container Recovery Corporation - "the world's largest recycler of aluminum cans" - which it established in 1978.[40] This is a fairly straightforward ad which promotes an aspect of the company that has been in place for a long time. More specifically, the ad is not deceptive because it does not promote recycling as a recent change that the company has made or leave consumers with any false impressions regarding Anheuser-Busch's policy. Had the advertisement claimed that the company had recently made environmental changes in response to increasing consumer interest in recycling or because the company had made changes in its overall green policies, the ad could have deceived a reasonable consumer.

All in all, the companies that have made concerted efforts to respond to environmental needs should be applauded. These changes are often complicated and costly. Furthermore, these companies are experiencing a large amount of dissatisfaction when competitors are able to employ similar strategies without actually making any real alterations.

Deceptive and Misleading Green Marketing Claims

It is much easier to pin-point examples of deceptive and misleading environmental advertising claims. Without proper regulation, industry is finding it a rather simple task to promote a product as green, or to imply green changes, when in fact neither the

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[39] 1991 Anheuser-Busch Co.

[40] Ibid.

product nor the company are green. Most of the techniques for deliberately and deceitfully marketing products as environmentally safe fall under the title of green washing. In addition to the six green washing strategies, companies may also represent themselves as eco-safe through irrelevant claims.[41]

The first green washing technique is known as "the big lie." Because consumers lack the knowledge needed to evaluate most of the environmental advertising claims in the market, they will be unable to determine if a business is lying or not. In the case of the 'big lie,' a company will tell consumers what they want to hear, even if it is contrary to the facts. For example, when consumers began to be aware of the problems facing the ozone layer, businesses responded by labeling aerosol products as "ozone-friendly." As far as consumers could determine, this was a true statement because most aerosols no longer contained CFC's. The 'big lie,'however, was that many of these aerosols still contained chemicals that were classified as Class I ozone- depleters. In another situation, a company might claim that their degradable trash bags will help the landfill problem, even though it knows that, once buried in a landfill, their bags do not degrade any faster than ordinary plastic bags. The logic behind making "big lie" claims is that:

> "there are short term public relations gains in switching to a photodegradable grocery sack or a consumer trash bag. . .and it's a public relations value that has to be considered as opposed to real solutions to the problem."[42]

In other words, in spite of the obvious harmful effects of many products, industry is, for

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[41] Dean, Norman L. "Stop the Green Wash," In Business: 46-47.

[42] Ibid p. 46.

the most part, putting "more money into environmental advertising than environmental action."[43]

The second green washing technique is called the "half-truth," and it tends to be less recognizable than the "big lie." In this situation, a business will focus on a particular aspect of a product that "sounds environmentally friendly." For example, if a paper product like toilet paper is made from 100 percent virgin fibers, but the inside cardboard tube is made from recycled materials, the business can market the product as 'containing 100% recycled material.' In other words, the company can 'mean' that the inner tube is made from the recycled material, and 'imply' that the entire product is recycled. According to a report about the green image:

> "There is no reason to give up in despair if your product is environmentally-unfriendly on two dozen different counts. . . Consumers, journalists and (mainstream) pressure groups are still all implicitly accepting piecemeal progress - so long as the company concerned appears to have a genuine commitment to moving in the right direction."[44]

This type of false hype tends to detract from legitimate claims and leads to consumer mistrust of all environmental ads.

The third green washing strategy is one of the simplest green marketing techniques. It is called "relabeling" and it means changing the label, not the product. This particular method is effective for potentially recyclable products. A company can make a product recyclable with a small advertising or label adjustment, even if no recycling centers are available. Proctor & Gamble, a corporation continually scrutinized

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[43] Ibid p. 46.

[44] Yearley, p. 100.

for its marketing strategies with regards to diapers, uses this type of campaign for disposable diapers. It claims that a new technique can solve the on-going controversy between cloth and disposable diapers and ease mothers' environmental concerns. This technique, called composting, would allow approximately 90% of the diaper to be ground up and returned to the soil. Many of the composting ads showed a young tree and claimed that "90 days ago this was a disposable diaper."[45] Knowing the scarcity of composting facilities, P & G made an '800' number available to "set up a composting site near you."[46] Unfortunately, the company neglected to mention that the reason there were less than ten facilities available nationwide was due to the extraordinary cost of building them: about $10 million each.[47]

Another green washing technique involves focusing on packaging. In this case, a company would want to emphasize the green qualities of the packaging instead of the non-environmental nature of the product. For example, a company might advertise that now the packaging could be recycled. This implies a proper pro-environmental attitude and detracts from the non-green nature of the product.

One of the more confusing green washing techniques is appropriately called "changing the subject." By running an ad about something good the company did or does for the environment, no matter how trivial, a consumer may be completely unaware that

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[45] Proctor & Gamble 1991

[46] Ibid

[47] Aunen, Lauri, "Problems of Green Marketing," L.A.W. Conference, Eugene, Oregon, 12 March 1992.

the company has an overall reputation for harming the environment. It is very deceptive because through the ad the company appears concerned about the environment and the claim is undisputable. Consumers will take on face value the greenness of the company because it may very well have done that 'good deed.' Unfortunately there are multitudes of examples of this particular technique. Recently General Motors decided to run a series of ads claiming that GM was an avid supporter of environmental progress. However, at the same time the ad, "20 years of environmental progress," was impressing consumers, GM was one of the biggest lobbyists **against** the Clean Air Bill.[48] The Coors Co. came out with a campaign "Clear Water 2000," which explained that because water was such a critical factor in manufacturing beer, Coors valued the "virtues of pure Rocky Mountain water." While this ad seems credible, Coors fails to mention that in 1990 it was found to have discharged contaminated groundwater into streams near its canning plant.[49] One more example of this green washing technique can be found by examining any of the "People Do" campaigns run by Chevron Corp. These ads, which appear to promote endangered species and habitats, definitely change the subject from Chevron's real practices. Chevron is known to be one of California's biggest polluters, it disrupts grizzly bear habitats in Montana with oil and gas exploration, its limited conservation efforts were required by the US Fish and Wildlife Service, and it has been required to pay hundreds of millions of dollars in fines for environmental degradation. "By creating the 'People Do' campaign, Chevron wants the public to believe that it has set higher

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[48] Advertising Age. 29 January 1991: 27-28.

[49] "Company Performance Roundup," Business and Society Review: 63.

standards for itself, but its true commitment to the environment remains to be seen."[50] Unfortunately, unless companies receive negative publicity about their messages, the average, reasonable consumers would never realize that campaigns are not necessarily reinforced by sound environmental action.

An additional green washing technique involves obtaining third party endorsements. A claim may look more official if a third part expert makes the earth-friendly product claim. Currently this technique is not overly used; however, with the rise in seals and certification systems, it may become more popular (see appendix A).

Finally, one more method for creating deceptive advertising should be noted. Many businesses are making completely irrelevant green claims. This is comparable to a toothpaste company claiming that they didn't harm dolphins when manufacturing their product. Unfortunately not all irrelevant claims are so obvious. Tambrands Inc. utilized this type of strategy when it designed a campaign to introduce a new product feature for Tampax. The headline read "A comforting new environmental tip." It seems fairly obvious that the environment has nothing to do with the introduction of this feature, and that the presence of the word "environmental" is merely a move to catch green consumers' eyes. While Tambrands has been supporting environmental products for many years, the campaign strategy in this case is irrelevant and trivial.[51]

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[50] Lowe, Justin and Hillary Hansen. "A Look Behind the Advertising: The Journal investigates Chevron's eco-ad campaign." Earth Island Journal: 26-27.

[51] Tambrands Inc. 1991.

FTC Action on Deceptive Environmental Advertising

Although the Federal Trade Commission is often slow to act in situations involving deceptive advertising claims, some cases dealing with environmental messages have already been solved. These are important foundation laying steps not only for the creation of federal regulation, but also as indicators of proper environmental marketing strategies for companies wishing to be self-regulating until policy is established. Among the cases settled are two involving ozone claims and three relating to product degradability.

The first case involving ozone-safety claims was settled in April, 1992. The company involved in the complaint was Zipatone, Inc., an Illinois based manufacturer of artists material, and it was charged with "making false environmental claims for Zipatone Spray Cement." The company claimed that its product was an "ecologically-safe propellant~ when, in fact, the main ingredient is 1,1,1-trichloroethane, a Class I ozone-depleting chemical. As a result of this deceptive claim, Zipatone has entered into a consent agreement with the FTC to refrain from "representing any that any product containing a Class I ozone-depleting substance will not damage the environment. . ."[52]

The second case dealing with ozone-safe claims was brought against Jerome Russell Cosmetics in 1991. Again, this involved a company making "ozone safe" and "ozone friendly" claims for products (Hair Color, Fluorescent Ultra Hair Glo, Hair and Body Glitter Spray, and Fluorescent Color or Glitter products) which contained Class I

[52] Federal Trade Commission News, 22 April 1991.

ozone-depleters. And, as in the case with Zipatone, the FTC is proposing that a consent agreement be signed which would prohibit Jerome Russell from making "ozone safe" and "ozone friendly" claims for products containing ozone-depleting substances.[53]

Another consent agreement was proposed by the FTC to settle charges that American Enviro made "unsubstantiated claims that its 'Bunnies' disposable diapers, when disposed of in a landfill, will decompose and return to nature within three to five years or 'before your child grows up.'" The agreement, made official in November 1991, would prohibit the California company from making unsubstantiated degradability claims in the future.[54]

RMED International is also facing deceptive advertising charges for its degradability claims with regards to "TenderCare" disposable diapers. The proposed consent agreement would prohibit the company from making claims that TenderCare diapers will completely decompose and return to the earth within a short period of time and that the diapers offer a "significant environmental benefit when buried in landfills."[55] In addition, if the company does make composting claims it must disclose the fact that facilities for composting are generally not available and the approximate percentage of the U.S. population that has access to such composting programs.

Finally, the FTC has settled a case with First Brands regarding charges that it

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[53] FTC News, 5 June 1991.

[54] Federal Trade Commission, 10 September 1991.

[55] FTC News, 19 February 1992.

failed to have enough scientific basis for claims that its "Glad" trash bags will completely break down within a short period of time. The consent order would prohibit such claims in the future, and would require First Brands to substantiate "environmentally friendly" and "safe for the environment" claims with reliable and accurate evidence.[56]

All in all, while the Federal Trade Commission appears to be moving rather slowly on environmental advertising cases, it is developing important guidelines for businesses to follow until national standards are established. In addition to the five cases named above, the FTC has settled two more cases. Furthermore, it is currently investigating twenty other environmental marketing claims involving products that are supposedly "degradable," "biodegragable,""photodegradable," "CFC free," "ozone friendly," "environmentally safe," "environmentally friendly," "recycled," and "recyclable."[57]

[56] Federal Trade Commission, 28 October 1991.

[57] Georgianna Allsopp Forbes, letter to the author, 2 March 1992.

IV.

Recommendations for Regulation of Environmental Advertising

In recent years, the rising importance of environmental marketing claims has led many businesses to incorporate various green messages into their advertisements. In response to this rising influx of environmental marketing strategies, many organizations, comprised of participants from the government, the private sector and the business field, have been active in attempting to formulate some form of regulation. These agencies, like the Environmental Protection Agency and the National Association of Attorneys General, have offered numerous suggestions regarding creating a consistent system of acceptable green marketing claims. Janet Steiger, chairwoman of the Federal Trade Commission, stated:

> "In sum, much of what I heard at the hearings reinforced the words of General Humphrey, on behalf of a group of 11 state Attorneys General, 'Never before have the business community, state regulators, and consumer activists, been so much in agreement on any single point and that is for the need for federal guidelines that will fit the national marketplace.'"[58]

However, while most of the agencies involved seem to agree that it is necessary to create a set of regulatory standards, many of the proposals have not been uniformly received.

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[58] Janet Steiger, address, EPA National Environmental Labeling Conference, 1 October 1991.

Often businesses, pushing for regulation to clarify exactly what is acceptable for use in advertising, clash with consumer protection agencies which generally demand the strictest control possible. The Task Force of Attorneys General (Task Force) heard testimony from many of the above named organizations at hearings in 1990, which allowed them to gather enough information to recommend some initial guidelines. Some of the proposed regulations are based upon testimonies outlined in the Green Report by the Task Force, while other agencies like the Environmental Protection Agency have been conducting and publishing their own studies.

Consistent Federal Standards

One of the most voluminous problem areas in environmental advertising stems from a lack of uniform definitions with regards to environmental terms. As outlined above, however, most agencies are in complete agreement as to the need for a consistent set of federal definitions. As stated in the Green Report, "by far the most important area of consensus, however, [is] the virtually unanimous call for the development of uniform national guidelines or standards for environmental marketing claims".[59] This is primarily attributed to the fact that definition of claims and terms is considered one of the largest areas of confusion, not only on the part of consumers, but also on the part of businesses. At recent Federal Trade Commission hearings members of the business community touched on this theme:

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[59] Green Report, p. 9.

"Repeatedly during the [FTC] hearings, representatives of industry testified that in the absence of federal policy, the potential for inconsistent or conflicting state and local regulation of environmental claims would put national advertising and marketing legally at risk."[60]

Until some regulations are in effect, businesses will be unable to accurately determine what is and what is not acceptable to include in environmental advertising.

However, in light of the fact that this issue is receiving so much attention, some fairly generic standards have already been proposed by various public and private agencies. The Task Force in particular, has drafted some standards in order to regulate advertising content, and recommends that claims be substantive, relevant and supported. In other words, environmental advertising claims must be backed and substantiated by accurate and proven data. Commentary in the Green Report states that:

"Nonsubstantive claims are widespread in 'green marketing' today. These trivial and irrelevant claims create a false impression of a product's overall environmental soundness. They also contribute to consumer confusion."[61]

Claims must also be representative of a modification that the company has made. In other words, if a company implies that it established a procedure to recycle company waste or has made an improvement in a product in response to environmental concerns, when in fact it is only capitalizing on a benefit that has been if effect for a long time, the ad will mislead consumers. "The promotion of a previously existing but previously unadvertised positive environmental attribute should not create, either explicitly or

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[60] Steiger, p. 7.

[61] Green Report, p.43.

implicitly, the perception that the product has been recently modified or improved."[62] Therefore, there should be some set definition of acceptability of the words used to imply these "changes." Terms like "New" and "Improved," which imply a recent change, should only represent actual changes. For example, in this case, a company could claim that it "has been recycling since 1983," and it would be making an accurate non-deceptive statement.

Another area which requires regulation is one that covers trivial or irrelevant claims. Consumers lose respect for green marketing when they learn that a particular value they believed, was, in fact, based on insignificant or inapplicable knowledge. For example, a company should avoid making a claim of recyclability for products like trash bags, "which are highly unlikely to be used again for any purpose."[63] An example of an accurate yet inconsequential claim is a "polystyrene foam cup that claims to 'preserve our trees and forest.' It is. . . deceptive to suggest that a product made of petroleum products. . .provides an environmental benefit because it does not use trees."[64] Consumers, not understanding the manufacturing process of polystyrene may believe this particular product is better than similar products because of the ad's implications.

In addition to regulating general types of claims, the FTC is also being asked to establish definitions of specific terms used in the content of environmental advertising.

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[62] Federal Register, Green Report II, Section 1.2, Vol. 56, No. 105. 31 May 1991.

[63] Federal Register, Green Report II, sec. 3.1.

[64] Ibid, 3.1.

This is also one of the areas that has very little agreement between all of the concerned agencies. Some of the categories of terms currently under question include those terms relating to "recyclability," "degradability," and "general benefit claims." In order to correctly regulate this area, federal definitions must be agreed upon and made available for referral. However, establishing the definitions is difficult as businesses, consumers and government all have different needs in this area.

One of the most controversial categories deals with claims of recyclability. This area includes ads that promote a product as being made of "recycled" material, as well as the claims relevant to a product's post consumer use "recyclability." Currently, two types of recycled material exist, that of pre-consumer waste and post-consumer waste. The former category refers to the waste that is recycled within an industry and is never handled by consumers. The second form is the variety that most consumers assume is being referred to: the type of material that has been used by consumers and has been returned to the factory for reuse. The deception arises because consumers automatically assume, after seeing or hearing a "recycled" claim, that the product is made from post-consumer material. Therefore, using this claim without clarifying which type of recycled material is being referred to is "confusing and possibly misleading."[65] Federal regulation in this instance would be relatively simple: either restrict the word "recycled" to only post consumer waste, or qualify the word by specifically labelling the type of waste.

The word recyclable is potentially much more deceptive. The term recyclable currently refers only to the ability of a product to be recycled. Consumers, on the other

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[65] Green Report, p. 18.

hand, understand the expression to mean that recycling facilities are available and that the item is being accepted. Regulation in this situation is already encountering some very emphatic opposition. Federal standards will have to be implemented which establish appropriate and fair distances to recycling facilities. In other words, even if a product could potentially be recycled, if no facilities were available within a certain distance of the product's distribution, the claim could not be made. As stated in the Green Report II, "Environmental claims relating to the potential for recovery of a particular product should be made in a manner that clearly discloses the general availability of the advertised option where the product is sold."[66] The greatest conflict lies using "recyclable" as a strategy on a national campaign. The Task Force heard testimony on this issue and found definite contrary opinions:

> "While environmental groups and consumer groups heartily endorsed this approach, the opposition from industry was nearly unanimous. Representatives from the business and advertising communities argued that it is impossible to make location specific disposability or recovery claims for products sold nationally."[67]

Businesses are concerned that while they will comply to a certain degree to this distance standard, small towns and areas of few recycling facilities will rule out the possibility for national advertising campaigns. Industry is claiming that, by advertising a product as recyclable, regardless of facility availability, it is furthering the education of customers. That is, if people realize that a particular material is not being accepted, and that it could be, they will advocate for recycling facilities. However, many of the agencies involved

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[66] Federal Register, Green Report II, sec. 2.

[67] Ibid, sec. 2.

feel that the exact opposite will occur and that consumers, discouraged over attempts to recycle, will discontinue recycling altogether. The regulatory agency, in this case, must decide if consumer deception or industry needs have precedence.

The second category of terms under discussion deals with those words relating to "degradability." This group includes everything from biodegradable to photo-degradable to compostable. And, like the term "recyclable," many agencies have different recommendations for each of these words. In general, when making a claim of degradability, a firm implies that using a particular product will increase the useful life of landfills. Consumers believe that, for instance, using a garbage bag that is biodegradable will be 'significantly' more beneficial to the environment than a regular bag. In addition, "degradability claims on . . .products may send the message that it is all right to litter such products."[68] However, studies conducted by the EPA indicate that "even products specifically modified to degrade more rapidly than conventional products do not degrade at any appreciable rate in landfills."[69] The general conclusion thus far has been that any claim of degradability should not be made in reference to a product that is intended to be disposed of in a landfill. In a very important decision, Mobil Corp's ads for Hefty Trash Bags, which were supposed to be "photo-degradable," were found to be deceptive. The ads claimed, "Once the elements have triggered the process, these bags will continue to break down into harmless particles even after they are buried in a

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[68] Federal Register, Green Report II, sec. 2.1.

[69] Ibid, sec. 2.1.

landfill."[70] Unfortunately, as stated above, the claims were deceptive because the bags did not degrade any faster than other bags, and in fact, did not degrade into "harmless particles."

The exception arises when facilities are available to process products that can be composted or are "biodegradable." If a location, such as a municipal solid waste facility, is available to "take advantage of biodegradability," then a claim of biodegradability may be made.[71] In this case, the product in question "will safely break down at a sufficiently rapid rate and with enough completeness. . .to meet the standards set by any existent state or federal regulations."[72]

Composting claims are relatively new to the green marketing field, and they appear to be experiencing the same opposition as recycling claims. Composting facilities, however, are extremely rare in the United States, and, as a result, even more restrictions are pertinent. Currently, the FTC is recommending that compostability claims be avoided because facilities are so limited. A product should not be promoted as "'compostable' or 'compostable where composting facilities exist' until a significant amount of the product is composted nationally."[73] In other words, because there are fewer than ten facilities nationwide, advertising a product as compostable is premature and is potentially

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[70] Schorsch, p. 7.

[71] Federal Register, Green Report II, sec. 2.1.

[72] Ibid, sec. 2.1.

[73] Ibid, sec. 2.2.

deceptive. However, if a company feels confident in making such a claim, it should be certain to qualify the statement as much as possible. The Green Report II states that an informative, non-deceptive claim could read:

> "This product is potentially compostable; however,less than 1% of the U.S. population has access to composting facilities. To find out if there is a Composting facility near you, call (800) xxx-xxxx."[74]

Additionally, the claim should also warn consumers that compostability does not mean that they can compost the product in their own back yards. Disposable diapers, for example, a product that is potentially compostable, should not be buried in the garden as compost.

The third category of environmental terms used in advertising is by far the most substantial. These phrases, labelled "general advertising claims," cover any terms that could potentially convey any positive, environmental aspect of a product, and yet don't really 'mean' anything. Some examples are "earth-friendly," "eco-safe," "green," and any combination designed to generically promote a product benefit. The potential for deception in using these terms is great because any interpretation could arise from their use. When businesses label any positive environmental benefit, such as the use of a minute amount of recycled material in the product's manufacture, as "earth-friendly," consumers must to determine what the company means by its claim. Customers could interpret the claim to mean that the entire product would not harm the earth, that its manufacture emits no pollutants, or any number of green benefits. "The claim is deceptive if consumers interpret [earth-friendly]. . .to mean that all significant

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[74] Ibid, sec. 2.2.

environmental aspects of the [product] are improved."[75] In cases involving general advertising claims, the Task Force recommended that a company qualify the terms to avoid deception. For example, labelling a product "earth-friendly because. . ." lessens the degree of confusion on the part of the consumers. For the most part, however, these claims should be avoided. "Generalized environmental claims which imply that a product has no negative or adverse impact on the environment should be avoided. Instead claims should be specific and state the precise environmental benefit that the product provides[76]." This allows companies with legitimate claims to continue to make them, and prevents businesses that are marketing trivial or insignificant benefits from profiting from the same environmental marketing strategies.

Federal Regulatory Responsibility

Currently, the Federal Trade Commission is the primary body being called upon to create effective green marketing standards. And, not only is there near unanimous agreement that federal standards are requisite, but also that they should be enacted by the FTC. The FTC has received positive input on this issue from the Environmental Protection Agency, the National Association of Attorneys General, the Environmental Defense Fund, the advertising community and the business community. Advertising agencies, which are referring to green marketing as "the third rail of advertising. Touch

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[75] Ibid, sec. 8.

[76] Ibid, sec. 1.1.

it and you die," are also asking for national standards.[77]

Once a system of federal regulations are in place and agreed upon by various government, industry and public agencies, a process for evaluating cases must also be established. It is imperative that a clear and concise method of handling claims be utilized to ensure proper and consistent treatment of environmental advertising. In addition, a regulatory agency must be given the responsibility of prosecuting deceptive claims.

The Federal Trade Commission currently handles all cases of deceptive and misleading advertising. The FTC is authorized to investigate unfair advertising under Section 5 of the Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices."[78] This enforcement power covers environmental advertising that contains "affirmative misrepresentations, fails to reveal facts which are material in light of the representations in the advertisement, or fails to reveal facts which are material with respect to consequences of use of the product."[79]

Since the FTC has experience handling cases of deceptive advertising practices, most organizations involved feel that it should continue to be the controlling federal body in charge of regulating environmental advertising claims. Chairwoman Steiger has reinforced this idea saying, "I believe [the FTC] should try to rise to the green claims

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[77] Steiger, p. 8.

[78] 15 U.S.C. S 45.

[79] Georgianna Allsopp Forbes, p. 1.

challenge," primarily because there is "near unanimity of opinion that Federal Trade Commission guidelines could be useful to both businesses and consumers and provide and helpful framework for environmental claims."[80]

In addition, the FTC receives research assistance from the Environmental Protection Agency which, in the future, will continue to lend its scientific expertise to the investigatory process. The Attorneys General involved with the creation of the Green Report have further recommended that "the FTC be given joint authority with the EPA to enforce violations of the [Federal Trade Commission] Act."[81] This would not only extend the alliance the EPA and the FTC have regarding cases of deceptive green marking, but also increase enforcement authority to the EPA. During the past several years the EPA has provided "useful guidance" on issues of plastic waste management, biodegradability claims for paper, recyclable and recycled content claims, and ozone-related claims for various aerosol products.[82] Combining its capabilities with the FTC's enforcement experience would be extremely beneficial.

A similar proposal by the Task Force recommends that an independent advisory board be created to oversee the formulation of a system of regulation. This board would be comprised of "a cross-section of industry, environmental, consumer and government representatives" and would advise the federal agencies involved in establishing national

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[80] Steiger, p. 7.

[81] Green Report, letter to The Honorable Frank R. Lautenberg, 29 June 1991, p. 7.

[82] Georgianna Allsopp Forbes, p. 4.

regulatory procedures.[83] This combination of agents from various sectors would enable the FTC to receive input from all interested parties while writing regulatory standards.

One of the primary concerns, should the Commission continue to handle deceptive green marketing claims, stems from the FTC's fairly limited law-making capabilities. In other words, the FTC's guidelines would not "preempt or legally displace different state laws," thus having little or no effect on potentially "inconsistent or conflicting state laws or regulations."[84] However, by coordinating all proposed regulations with states' spokes-people, industry and consumer action groups, the FTC will create guidelines that will not only protect consumers from deception, but also serve states' interests. It has been proposed at the FTC hearings, that the FTC and the EPA "work jointly with the states to develop uniform national guidelines for environmental marketing claims."[85] The Attorneys General have made additional recommendations, stating that:

> "In order to improve enforcement, we also strongly urge the inclusion of a provision granting enforcement authority to appropriate state and local law officials, including state Attorneys General. Again, such a provision would greatly enhance the limited enforcement resources at both the federal and state level by directing the combined resources of the EPA, the FTC and the state Attorneys General towards the regulation of deceptive environmental claims."[86]

In other words, while federal authority would not preempt state and local jurisdiction, it

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[83] Green Report, letter, 29 June 1991, p. 5.

[84] Steiger p. 14.

[85] Green Report, p. 28.

[86] Green Report, letter, 29 June 1991, p. 7.

would open up greater enforcement potential through federal-state cooperation. In fact, if states wish to impose even stricter environmental advertising policies, they will have full right to do so, without worry that federal policy will negate their recommendations.

Prosecution and Consequences

After all of the regulatory policies are legislated, they will be entirely ineffective if they are only recommendations and are not accompanied by a set of clear and consistent methods of prosecution. Furthermore, if these recommendations are not backed by severe consequences, there will be no incentive for businesses to adhere to them.

According to current FTC policy, advertising claims are investigated for deception or misleading practices. Under the Federal Trade Commission Act, the FTC prohibits ads that are "untrue, misleading, deceptive or fraudulent, including claims that, although literally true, mislead by omitting or obscuring material facts necessary to understand the claims made."[87] For the most part, however, environmental ads are largely unregulated, since, as stated previously, there is little established policy in this area. The FTC, currently the primary actant in injunction suits against deceptive advertising, has many options available for enforcing regulation of green advertising; some of which include case-by-case analysis, trade regulation rules, and federal guidelines.

Under present conditions, the FTC investigates deceptive advertising claims on a case-by-case basis. And, while the FTC rarely initiates any of these investigations, it receives cases from "consumers, environmental organizations, members of the industry,

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[87] Ibid, p. 2.

congress, [and from] state regulators."[88] In this situation, the FTC will examine ads individually to determine if the claims are misleading. While obviously selective and somewhat dependent on other agencies, this style allows the Commission to "examine in a detailed way the claims, the context in which they appear, and their substantiation."[89] In other words, because the field of environmental advertising is so new, the FTC is able to judge each case individually, and determine substantiation for each claim, rather than via a category as a whole.

The second change that the FTC could implement to regulate environmental advertising involves creating "trade regulation rules." Under section 18 of the Federal Trade Commission Act, the FTC is authorized to "conduct rule-making proceedings to determine if particular claims are deceptive."[90] In this case, if the Commission rules that a particular claim is deceptive, it may issue a trade regulation making it illegal to continue to make such claims. Violation of a trade regulation would mean judicial actions seeking injunctions against the ads as well as civil lawsuits. Furthermore, trade regulation rules may preempt state and local policies. However, because trade rules are binding and require full rule-making proceedings to be amended, they would have to be selectively implemented. The guidelines "strive for approaches that avoid rigid definitions most likely to lock in today's technology, leaving a potential defect of rendering

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[88] Georgianna Allsopp Forbes, p. 1.

[89] Federal Register, p.2.

[90] Ibid, p. 2.

guidelines obsolete in the future."[91] In other words, because the scientific knowledge about green marketing claims is continually changing, as are consumers perceptions and knowledge of environmental issues, trade regulations may rapidly become outdated.

The third policy allows the FTC to issue "interpretive guides." Under section 6(f) of the FTC Act, the Commission has the power to circulate advisory opinions and policy statements regarding deceptive advertising strategies. In the past, these guidelines have followed decisions the Commission has made and are designed "to bring about more widespread and equitable observance of laws administered by the Commission."[92] In other words, this would compliment existing case-by-case investigatory procedures, could be used to 'advise' industry against using similar strategies in future green marketing. However, while the guidelines can be easily changed to evolve with the environmental market, they are not binding, and present no formal "preemptive effect on State or local regulations."[93]

Additionally, as has been mentioned, the FTC has limited prosecution authority. For the most part, the Commission has a range of steps that it may take in order to remedy deceptive claims. If convicted of violating the FTC Act by formulating deceptive advertising, an industry made be held accountable through a variety of punitive actions.

The first, and by far the most lenient action that can be implemented by the FTC

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[91] Steiger, p. 15.

[92] Federal Register, p. 3.

[93] Ibid, p. 3.

is called voluntary compliance. This situation primarily involves advertisements that have run for some time, and ones that the FTC believe to be deceptive. If the advertisement is not too offensive, and the industry involved has a good record, the "company can terminate the advertisement and never use the claim again."[94] This particular method is very advantageous to the company because the withdrawal is not based upon admission of guilt and legal costs and publicity are kept to a minimum.

Consent orders are the next possible remedy for deceptive advertising and are similar to voluntary consent. This is a written agreement between the FTC and the company involved in the suit, in which the company agrees to never use a particular claim in the future. This type of restriction is usually substantiated by a lot of research on the part of the FTC, and the chance of the company winning an actual lawsuit is slim. As a result, most companies will readily agree to sign the consent orders. Once the order is signed, if the ad continues to run, the company can be fined "up to $10,000 a day while the violation continues."[95]

In both of these cases, however, the advertiser in question either feels that its claim would not stand in court, or it feels that the easiest option would be to consent. If the company feel that its advertising claim is truthful and refuses to sign a consent order, the FTC may issue a cease and desist order. "Under terms of such an order, the advertisements must stop or the advertiser faces a severe penalty: again, a fine of up to

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[94] Pember, p. 493.

[95] Ibid, p. 493.

$10,000 a day."[96] If the advertiser still feels that the claims made are valid, the company must be willing to go to court to appeal the FTC ruling. The ensuing legal process can be very lengthy and costly. If the company loses the lawsuit, it can receive a lot of negative publicity in addition to heavy fines. For these reasons, most companies under investigation will voluntarily withdraw or modify theirs ads or sign consent orders.

However, if the advertising campaign is very successful and "a residue of misleading information remains in the mind of the public," the FTC may feel that the circumstances require 'corrective advertising.' In the event that this remedy is required, the FTC forces the deceptive company to inform the public through additional ads or announcements that it has not been honest. The need for corrective advertising is evaluated on a case-by-case basis, and is based upon a standard outlined by the FTC:

> "If a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief."[97]

If the FTC believes that the advertisement in question satisfies these requirements, then corrective advertising will be appropriate. The corrective campaign may have to run for up to a year following the FTC decision and make up 25 percent of the companies advertising time.

The final step that the FTC may take is to issue an injunction against the

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[96] Ibid, p. 494.

[97] Ibid, p. 496.

advertisement in question. In this case, which is by far the most serious, the FTC must believe that there is a clear law violation and that the advertising will cause damage. If the FTC determines that this is the situation, the it has authorization to stop the advertisement, and administer monetary penalties.

V.

Potential Regulatory Problems

Regulation of environmental advertising is a critical part of generating overall environmental awareness. It not only signals to consumers the need to amend buying behaviors, but also indicates appropriate behavior to businesses. However, because the field of environmental advertising is enormous and relatively untested, many problems could potentially hinder to the process of regulation. As FTC chairwoman, Janet Steiger said, "To be sure, there are difficult challenges to be faced, and the success of any FTC effort, if undertaken, is certainly not assured."[98] Conflicts arising from misinterpretation of regulation, federal-state-local enforcement problems, and other factors could slow the development and promotion of federal regulatory procedures.

Large Scale of Environmental Claims

One of the main reasons that problems will continue to occur in the area of environmental advertising is the fact that the range of issues under this heading is far greater than that of any other advertising trend. Environmental problems can be linked to a steadily increasing number of new products and to most existing products as well as

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[98] Steiger, p. 15.

their manufacture. The situation, extensive to begin with, will have a scale of problems and conflicts to match.

Primarily, the field of environmental advertising will be difficult to regulate because of rapidly changing technology and a constant influx of new products. The marketing strategies that will match this field will evolve just as rapidly, and federal definitions of some terms will be legislated only in time to see new terms arrive. For example, after the first wave of controversy over chlorofluorocarbons in aerosols hit the public, many businesses marketed products as "ozone-friendly" in order to compete with these new consumer needs. Federal regulatory agencies stepped in and are still attempting to define "ozone-friendly." By using one of the "general benefit claims," to advertise the removal or lack of a singly damaging ingredient, industry should take "care. . .to avoid [making] the impression that the product is good for the environment in all respects."[99] Furthermore, when a business learns that using words like "ozone friendly" is potentially misleading and grounds for investigation by regulatory agencies, it may just drop the claim. Instead, the next ads may read "ecologically safe," and very little progress has actually been made. Or, since the Commission has declared CFC's harmful to the environment, a business may declare a product "CFC-free." Consumers could then, realistically, assume the product contained no elements that would harm the ozone when in fact the product might contain 1,1,1-trichloroethane, another class I ozone depleter. In other words, it will be extraordinarily difficult for the FTC, or any regulatory body, to keep up with the rapid evolution of green words and phrases.

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[99] Green Report, p. 34.

One of the main factors in determining a deception claim, involves deciding what constitutes reasonable confusion on the part of the consumer. In other words, what would a reasonable person assume from each ad. "There must be a representation, omission, or practice that is likely to mislead the consumer. The Commission will consider the entire advertisement as well as all other elements of a transaction when making [deceptive advertising] determination."[100] For the most part, this constitutes one of the most difficult areas of enforcing regulation. As each new ad and product is called into question, the regulatory bodies must determine what kind of information the average consumer either assumes or receives from each ad. The FTC has already remarked on this aspect of green marketing which differentiates it from other marketing trends:

> "Environmental marketing issues pose unique regulatory challenges not posed by other traditional advertising areas. First, although consumers have always been interested in the environment, public opinion polls indicate a recent dramatic increase in consumer interest in the environmental impact of the products they purchase. . .Consumers' high level of interest in this area, however, is not matched by an equivalent understanding of the often complex issues surrounding a product's impact on the environment."[101]

In other words, the average consumer, while demanding products that will help the waste problem, may purchase products labelled "photodegradable." Their lack of knowledge in this area may make this a deceptive claim, because consumers do not usually realize that landfills generally "retard degradation." And, because of the enormous scale of

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[100] Pember, p. 488.

[101] "Prepared Statement of the Federal Trade Commission Before the Transportation and Hazardous Materials Subcommittee, Energy and Commerce Committee, and U.S. House of Representatives." 30 October 1991, p. 17.

environmental issues, and the rapidity with which technology and products evolve, this problem is extremely common.

Overall, the field of environmental advertising will be very difficult to regulate because of the constant influx of new products and marketing strategies. Definitions of terms may arrive only in time to see new terms evolve, and regulation will have to continually evolve. This type of challenge was never presented to such a degree with past advertising trends. For example, when health concerns were a major part of marketing claims and warning labels were required on cigarette packs, it was a straightforward decision based upon recommendations from the medical field. The labels, while controversial, were simple, and compliance with the rule was easy to determine. Constantly changing environmental claims, however, require more interpretation, costly research, and time. The market continually updates, and the regulation must keep up with the changes.

Interpretation Conflicts

Another area of conflict may arise when regulatory decisions are challenged. Delays in regulatory practices may be a direct result of lengthy court proceedings if businesses challenge the FTC rulings. Industry may try to find loopholes by demonstrating vagueness of terms or challenge the idea that their ads were misleading. Again, due to the lack of precedents and the size of the environmental field, legal challenges to deceptive advertising claims can greatly slow progress.

Because the field of environmental awareness is constantly evolving, the FTC and other regulatory agencies will be hard pressed to keep up. As new terms and definitions are used, the FTC will have to evaluate new angles on deceptive claims. This may involve lawsuits by advertisers who believe their claims are valid, or who believe that the fines they received were unfair.

The problem of vague and uncertain terms may be compounded by the lack of precedents in the field of environmental advertising. Legal precedents are very effective tools for establishing more concrete terms and regulations. In addition, once a particular dispute has been settled in court, it is less likely that a business will attempt the same procedure. Looking at the case of Mobil's "Hefty degradable" Trash bags, the role of precedent becomes apparent. Mobil, after claiming that its bags degraded faster than other bags because they were photodegradable, was taken to court by six states on the grounds that its claim was deceptive. It was proven that, in fact, the bags possessed the same rate of degradability as other trash bags because they would be buried in landfills and not exposed to sunlight. This error cost Mobil around $150,000 in fines, and had there been a precedent, it might have never used the claim.[102] Unfortunately, precedent usually requires one person or agency to make the deceptive claim first. However, precedents can be extraordinarily helpful and clarifying regarding issues and laws.

General Complications

Finally, many of the conflicts and potential problems listed above have the ability

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[102] Advertising Age. 29 January 1991: 16-17.

to lead to an overall unwillingness to participate in environmental advertising. Businesses will attempt to find new marketing strategies if the process for green marketing is too complicated, regardless of how enthused consumers are for green products. On the whole, if federal regulation is too vague, too extensive, or too late in coming, businesses will be too discouraged to get involved.

VI.

Conclusion

Regulation of environmental advertising is merely a drop in the bucket of solutions to the problems facing the earth today. However, it is a problem that already has the attention of the majority of the country, directly or indirectly. "Advertising agencies' attempts to win the 'green consumer' are a rich resource for the analyst of changing social attitudes, both because their work has to be arresting and attractive in its own right, and because advertisements often carry a heavy burden of implicit meanings or connotations."[103] Because consumers are willing to amend purchasing habits, the Federal Trade Commission needs ensure that the information the public is receiving regarding environmental products is accurate and truthful. This will enable people to make the best decisions possible in order to have a lesser degree on impact on the earth.

Regulation also plays a vital role in retaining the cooperation of the business community. Those firms that are making concerted efforts to modify procedures should receive recognition for their time and money and not frustration because other industries make similar green claims without implementing any changes. Furthermore, regulation

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[103] Yearley, p. 2.

would prohibit those businesses that are not making a concerted effort to be environmentally friendly from profiting from consumer interest in this area.

While state and local governments are already participating in some areas, federal regulation would be the most effective. By creating a consistent set of national standards the amount of confusion on the part of consumers and industry would be significantly less.

All in all, this is an important issue, and the regulatory agencies have a lot of work to do in order to initially define the problems and offer solutions, as well as stay current on all terms and strategies. However, accurate and reliable advertising can help consumers and businesses participate positively in the green wave.

Appendix A

Environmental Seal Certification Programs

In addition to environmental advertising, consumers may soon be given another option in the stores to facilitate their green buying decisions: environmental seals of approval. While several seals will be or are available, two in particular will help consumers wade through shelves of so-called green products. These two non-profit organizations, Green Seal and Scientific Certification Systems, operating independently of each other, will provide consumers with additional knowledge about a product's effect on the environment. However, because the two programs are utilizing different standards of evaluation, their seals could, without proper consumer education, add to the clutter of an already overcrowded market.

Environmental labeling programs, while new in the United States, have been in existence since the first seal was introduced in the former Federal Republic of Germany in 1978. Canada and Japan added their versions of the eco-seal in 1988 and numerous other countries are in the process of establishing seals as well. And, in each of the countries, approaches to creating new environmental policy have "often been based on the assumption that market forces fail to consult and often run counter to environmental interests."[104]

In general, the idea behind issuing seals of approval is to provide consumers with enough product information to make appropriate green buying decisions.

Green Seal is a nonprofit organization that uses its mark to "unleash consumers' power" to help the environment.[105] Green Seal bases its seal on an analysis of a products effects from consumer use to recycling or disposal. The certification mark, a blue globe with a green check, will be "awarded to products that meet strict environmental standards set on a category-by-category basis."[106] In other words, within a product category like toilet paper, standards will be written up and be available for comment. Once the standards are officially set, a company may apply to have its product evaluated. If it meets the criteria, then the product will be awarded the Green Seal Certification Mark. All in all, "Green Seal's goal is to keep technology moving forward and to encourage manufacturers to incorporate the latest inventions."[107]

Green Cross, or Scientific Certification Systems, utilizes a completely different procedure for product evaluation. Unlike Green Seal, Green Cross plans to review products on two different levels: it will verify existing product claims, and it will evaluate products on a cradle-to-grave basis. Unlike Green Seal, Green Cross will

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[104] Salzman, James. "Environmental Labelling in OECD Countries." OECD 1991.

[105] Alexander, Susan. "Green Seal: the Organization." 12 March 1992.

[106] **Ibid**.

[107] **Ibid**.

"collect information about the environmental burdens associated with each stage of product's manufacture, distribution, use and disposal."[108] Furthermore, the information will not just be used to award or not award a seal of approval. Instead, Scientific Certification Systems plans to distribute a sort of "environmental report card." This report card will only present information about the product, package and manufacture processes in a manner similar to the nutritional informational panels found on many food products. "Rather than filter the data, or attempt to boil it down into a simple 'seal of approval,' the Environmental Report Card is being designed to provide comparative information over a full range of concerns." [109]The consumer will then have the option of reading the information and formulating a buying decision based upon this.

Both Green Seal and Green Cross have entered the market with a few certifications. Businesses have the opportunity of applying for either seal, although each one is currently only reviewing certain types of products. As each program expands and becomes more familiar, businesses will apply for certification. Unfortunately, without proper education or control, these seals may lose credibility when joined by other seals like the Good Housekeeping seal, or when consumers do not understand the criteria of each.

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[108] Chet Chaffey, "Scientific Certification Systems' Green Cross Environmental Certification Program." L.A.W. Conference, Eugene, Oregon, 12 March 1992.

[109] Chaffey, Chet. "Scientific Certification Systems." 12 March 1992.

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Advertising Age. "The Green Marketing Revolution: special edition." 29 January 1991. The entire issue of this newspaper described the environmental marketing trend. Particularily pages 26-29 dealt with specific examples and recommendations.

Advertising Age. "Green Marketing Special Report: Thinking Green Gets Complicated." 28 October 1991: GR-1 - GR-16. The insert to this edition of this newspaper updated the information outlined in the January edition. It covered the changes in the field and discussed the on-going trend of green marketing. Furthermore, it was beneficial in that it pointed out many of the problem areas.

Alexander, Susan. "Green Seal: the organization." Land, Air and Water Conference. Eugene, Oregon, 12 March 1992. In one of the workshops at the L.A.W. Conference, Ms. Alexander spoke about the Green Seal program. She outlined its purpose and its goals, and presented the audience with an excellent overview of the situation. She also compared and contrasted her program to that of Green Cross.

Allsopp Forbes, Georgianna. Letter to the author. 2 March 1992. In response to my query, Ms. Forbes sent a detailed letter describing the role of the Federal Trade Commission not only in the field of advertising regulation, but also in the specific area of environmental advertising and its regulation. She stated the FTC's position and described some cases that had already been completed.

Anheuser-Busch Co. "You won't believe what this can can do." 1991. This is an excellent ad that uses a legitimate environmental marketing strategy. It does nothing to mislead consumers and is very straightforward.

Anonymous. "Company performance roundup." Business and Society Review. Summer 1990: 64-65. This was a general review of industry activity, and it included any legal action taken. In this case, there were several environmental reviews of company policy as well as explanations of businesses taken to court over green marketing issues.

Anonymous. "Deceptive Ads: the FTC's laissez-faire approach is backfiring." Business Week. 10 August 1985: 136. This was a good background article. It went through the perceived FTC role in advertising regulation and outlined some cases handled. It generally criticized the FTC's role in the regulation of marketing strategies because the FTC rarely initiates investigation, it only follows through on the recommendation of other agencies.

Aunen, Lauri. "Problems of Green Marketing." Land, Air and Water Conference. Eugene, Oregon, 12 March 1992. Ms. Aunen spoke about the rising problems of environmental advertising and the difficulties that would occur with regulation. She addressed a very wide range of topics in this field, and used many concrete examples.

Carson, Patrick and Julia Moulden. Green is Gold. Canada: HarperBusiness, 1991. This was an interesting book aimed more at showing industry how it can go green. In addition, the reference was made that if an honest company change was made, it would be able to participate in environmental advertising. However, until businesses go green, regulation will be needed to prevent deceptive or misleading advertising.

Chaffey, Chet. "Scientific Certification Systems' Green Cross Environmental Certification Program." Land, Air and Water Conference. Eugene, Oregon, 12 March 1992. Mr. Chaffey gave an excellent introduction into the Green Cross Certification Program and stated the general goals of the company. He explained the package panel, similar to the RDA panel, which would allow consumers to make their own buying decisions.

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Federal Trade Commission. "Prepared Statement of the Federal Trade Commission Before the Transportation and Hazardous Materials subcommittee, Energy and Commerce committee and the U.S. House of Representatives." 30 October 1991. This was a very lengthy presentation which dealt with many issues, including the rising need for regulation in environmental advertising. It discussed the increasing number of deceptive ads as well as the importance and overwhelming need for federal guidelines.

Federal Trade Commission. "For Your Information." Newsletter. 10 September 1991. This discussed the proposed consent agreement between the FTC and American Enviro for claims of deceptive advertising on their "Bunnies" disposable diapers campaign.

Federal Trade Commission. "For Your Information." Newsletter. 28 October 1991. This also discussed a consent order proposed by the Federal Trade Commission. In this situation the deceptive ad stated that Glad trash bags would decompose in a short period of time.

Federal Trade Commission. "FTC News." Newsletter. 22 April 1991. This was a proposed consent agreement for deceptive advertising on the part of Zipatone and was in regards to a misleading ozone claim.

Federal Trade Commission. "FTC News." Newsletter. 5 June 1991. This explained the proposed consent agreement between the FTC and Jerome Russell Cosmetics. Again, the deceptive ad involved a misleading ozone claim.

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National Association of Attorneys General. "The Green Report: findings and preliminary recommendations for responsible environmental advertising." November 1991. This is a very thorough document drafted by a task force of Attorneys General and presented to the Federal Trade Commission. Based on hearings by members of the community, industry, the government and consumer action groups, the Green Report describes the situation and makes recommendations for future regulation of green marketing.

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